

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LARRY PHILPOT,	:	
	:	
Plaintiff,	:	17 Civ. 4646
	:	
v.	:	JURY TRIAL DEMANDED
	:	
ACB ASSOCIATES, L.P.,	:	
	:	
Defendant.	:	

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COMPLAINT

Plaintiff Larry Philpot (“Philpot”), by his undersigned counsel, for his complaint against defendant ACB Associates, L.P. (“ACB”), alleges:

Nature of the Action

1. Philpot is bringing this action to obtain damages resulting from the infringement of Philpot’s registered copyright in the photograph of American musician, singer and songwriter Larry Gatlin (the “Photograph”).

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the claim asserted in this action pursuant to 28 U.S.C. § 1331 and § 1338(a) because it arises under the Copyright Act, 17 U.S.C. § 101 *et seq.*

3. Venue is proper in this District pursuant to 28 U.S.C. § 1400(a) because ACB resides in this District.

4. The Court has personal jurisdiction over ACB because it has its principal place of business in this State.

The Parties to this Action

5. Philpot is a natural person having a usual place of business at 12527 Winding Creek Lane, Indianapolis, Indiana 46236. Philpot is a professional music photojournalist.

6. ACB, formerly The New York Observer, L.P., is a limited partnership organized and existing under the laws of the State of Delaware, with its principal place of business at 1 Whitehall Street, 7th Floor, New York, New York 10004. Upon information and belief, ACB is engaged in the business of generating advertising revenue from click advertisements on its Internet news site, www.observer.com.

Statement of Facts

A. Philpot's Ownership of the Photograph

7. Philpot created the Photograph. A true and correct copy of the Photograph is attached as Exhibit A.

8. Philpot is the author of the Photograph, and has, at all times, been the sole owner of all right, title, and interest in the copyright in the Photograph (the "Copyright").

9. Philpot registered the Copyright, in a collection of photographic works, with the United States Copyright Office. On or about August 21, 2013, Philpot received for those works United States Copyright Registration No. VAu 1-164-624, which is valid and enforceable. The certificate of registration is attached as Exhibit B.

B. ACB's Infringing Activities

10. Upon information and belief, at all relevant times, ACB has owned and operated the website at the URL www.observer.com.

11. Upon information and belief, on or about June 16, 2016, an employee of ACB (i) made a copy of the Photograph on a computer, (ii) uploaded the Photograph to the URL <https://nyoobserver.files.wordpress.com/2016/06/larry-gatlin.jpg?quality=80&w=635&h=423> (the “Photograph URL”), (iii) published an article entitled *DO: See Country Legend Larry Gatlin’s Acoustic Performance at Vinegar Hill Theater* to the URL www.observer.com/2016/06/do-see-country-legend-larry-gatlins-acoustic-performance-at-vinegar-hill-theater/ (the “Observer Article”), and (iv) using HTML source code, caused the Photograph at the Photograph URL to appear with the Observer Article. Upon information and belief, ACB’s purpose in causing the Photograph to appear with the Observer Article was to improve the quality of the website, and encourage users to click on ACB content and ads, generating advertising revenue for ACB. A true copy of the Photograph appearing with the Observer Article is attached hereto as Exhibit C.

12. Upon information and belief, at all relevant times, ACB owned and controlled the server for the domain name “observer.com” (the “Server”).

13. ACB never licensed the Photograph from Philpot, or had Philpot’s permission to copy or display the Photograph.

14. ACB did not credit Philpot for the Photograph and instead credited itself. ACB’s terms of service, at <http://www.observermedia.com/terms>, state that, “All of the content featured or displayed on the website, including without limitation text, graphics, photographs, images, moving images, sounds and illustrations (‘content’), is owned by Company, its licensors and/or its content providers.” Further, at the bottom of ACB’s webpage at www.observermedia.com, ACB states, “© 2015 Observer Media | All original photography shot for Observer.”

A CLAIM FOR RELIEF
(Infringement of the Photograph – 17 U.S.C. §§ 106 and 501)

15. Philpot incorporates by reference each allegation contained in paragraphs 1 through 14 above.

16. Philpot owns the Copyright and the registration of the Copyright, which are valid and enforceable.

17. ACB infringed the Copyright in the Photograph in at least the following ways.

A. Liability for Reproduction under 17 U.S.C. § 106(1)

18. ACB infringed the Copyright by reproducing the Photograph on a hard drive, and on the Server at the Photograph URL and/or the Observer Article, in violation of 17 U.S.C. § 106(1).

B. Liability for Public Display under 17 U.S.C. § 106(5)

19. ACB infringed Philpot's Copyright by publicly displaying the Photograph on the Server at the Photograph URL, and/or the Observer Article, in violation of 17 U.S.C. § 106(5).

20. ACB is not, and has never been, licensed or otherwise authorized to reproduce, publicly display, and/or use the Photograph.

21. Upon information and belief, the foregoing acts of infringement by ACB have been intentional and/or in reckless disregard to Philpot's rights.

22. As a direct result of ACB's liability for the infringement of the Copyright, Philpot is entitled, under 17 U.S.C. § 504(b), to his damages and/or ACB's profits from the infringement.

23. Alternatively, Philpot is entitled to statutory damages pursuant to 17 U.S.C. § 504(c) of up to \$150,000 for the willful infringement of the Copyright.

24. Philpot is entitled, pursuant to 17 U.S.C. § 505, to his costs including reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Philpot respectfully requests judgment as follows:

A. That ACB be adjudged to have infringed the Copyright in violation of 17 U.S.C. §§ 106 and 501;

B. That Philpot be awarded the greater of (a) Philpot's actual damages and/or ACB's profits attributable to its infringement of the Copyright, or (b) alternatively, statutory damages of up to \$150,000 pursuant to 17 U.S.C. § 504, the precise amount to be determined by the trier of fact in this action;

C. That Philpot be awarded his costs, including attorneys' fees, pursuant to 17 U.S.C. § 505; and

D. That Philpot be granted such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Philpot hereby demands a trial by jury on all issues so triable in accordance with Federal

Rule of Civil Procedure 38(b).

Dated: New York, New York
June 20, 2017

DUNNEGAN & SCILEPPI LLC

By  _____

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Exhibit A



Exhibit B



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Register of Copyrights, United States of America

Registration Number

Vau 1-164-624

Effective date of
registration:

August 21, 2013

Title

Title of Work: Concert photographs through August 15, 2013

Completion/Publication

Year of Completion: 2013

Author

■ **Author:** Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

Copyright claimant

Copyright Claimant: Larry Gene Philpot

12527 Winding Creek Lane, Indianapolis, IN, 46236

Certification

Name: Larry G. Philpot

Date: August 15, 2013



Registration #: VAU001164624

Service Request #: 1-979744461



Larry Philpot
8125 Halyard Way
Indianapolis, IN 46236 United States


Exhibit C



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**OBSERVER**

DO: See Country Legend Larry Gatlin's Acoustic Performance at Vinegar Hill Theater

By [George Dvorsky](#) • 06/16/16 9:11pm



Country legend Larry Gatlin Larry Gatlin

There are over 40 shows booked for Vinegar Hill's inaugural season, but country legend [Larry Gatlin](#)'s acoustic performance on August 20th is one of the shows I'm most excited about. I've been listening to him for decades, and am in awe of his talent.

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